(2)

No. 03-1701

IN THE

Supreme Court of the United States

RODNEY LEROY CRAIG,

Petitioner,

—v.—

TAMIKA HOLSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF GEORGIA

REPLY BRIEF IN SUPPORT OF CRAIG'S PETITION FOR A WRIT OF CERTIORARI

JAMES T. BUDD
Counsel of Record
MABRY & MCCLELLAND LLP
2200 Century Parkway, N.E.
10th Floor
Atlanta, Georgia 30345
(404) 325-4800

Counsel for Petitioner

RULE 29.6 STATEMENT

No corporation is a party to this action. Petitioner Craig is insured by Infinity Insurance Company.

TABLE OF CONTENTS

PAGE

Rule 29.6 Statement i

TABLE OF AUTHORITIES iii

THE GEORGIA COURT OF APPEALS' RULING UPHOLDING THE PUNITIVE DAMAGES AWARD DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *GORE* AND *STATE FARM* 1

A. The Punitive Damages Award is Presumptively Unconstitutional Because Of The 22.7-to-1 Ratio Of Punitive to Compensatory Damages 1

B. The Georgia Court Of Appeals' Comparison Of The Punitive Damages Award To Hypothetical Compensatory Damages, Rather Than The Plaintiff's Actual Compensatory Damages, Conflicts With *State Farm* 3

C. The Georgia Court Of Appeals' Justification Of The Punitive Damages Award By Reference To Dissimilar Conduct Conflicts With *State Farm* 5

CONCLUSION 7

TABLE OF AUTHORITIES

Cases: PAGE

BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996) ..... *passim*

Campbell v. State Farm Mut. Auto. Ins. Co., No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004) 2, 3

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, (1991) 2

State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003) ..... *passim*

THE GEORGIA COURT OF APPEALS' RULING UPHOLDING THE PUNITIVE DAMAGES AWARD DIRECTLY CONFLICTS WITH THIS COURT'S DECISIONS IN *GORE* AND *STATE FARM*

A. The Punitive Damages Award Is Presumptively Unconstitutional Because Of The 22.7-to-1 Ratio Of Punitive To Compensatory Damages

This Court's decision in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), makes clear that the 22.7-to-1 ratio of punitive to compensatory damages in this case is unconstitutionally excessive. Contrary to Holsey's assertion, Petitioner Craig does not argue that punitive damages awards exceeding compensatory damages by a 9-to-1 ratio are per se unconstitutional. Instead, the award in this case is unconstitutional because "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," and this case is not one of the few cases necessitating a departure from the single-digit ratio benchmark set by this Court. *State Farm*, 538 U.S. at 424-425.

To attempt to overcome this vulnerability, Holsey argues that the facts of this case are "extraordinary" and that Craig's conduct was "unique." (Respondent's Brief in Opposition at p. 8). This argument is patently defective and without merit. Although all punitive damages cases arguably involve egregious conduct, Craig's act of driving under the influence was not undertaken with any ill will, sinister motive, or malice. Therefore, this case is no different from any other case involving a defendant driving under the influence and is in no way "unique" or "extraordinary" in comparison to other punitive damages cases.

If this Court were to deny Craig's Petition, and accept Holsey's argument, it would mean that any accident involving a defendant driving under the influence would be free of the due process limitations on punitive damages awards as set forth in *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). Such an exception is clearly incompatible with this Court's holding that "few" cases can exceed the single-digit ratio benchmark while satisfying due process and that a defendant's conduct must be "particularly egregious" in order to do so. *State Farm*, 538 U.S. at 424-425. Indeed, many cases involving driving under the influence would then constitutionally exceed the single-digit ratio benchmark if Holsey's position is accepted.

Holsey is also mistaken when she asserts that the only basis for the argument that the 22.7-to-1 ratio in this case is unconstitutionally excessive is a single sentence from this Court's opinion in *State Farm*. In fact, this Court has on multiple occasions stressed that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety" and that "[s]ingle-digit multipliers are more likely to comport with due process." *Id.* at 425; *Gore*, 517 U.S. at 581; *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24, 111 S.Ct. 1032 (1991).

Despite Holsey's attempt to downplay it, courts have inconsistently applied this Court's decisions on punitive damages as is illustrated by a comparison of the Court of Appeals' decision here with the Supreme Court of Utah's decision in *Campbell v. State Farm Mut. Auto. Ins. Co.*, No. 981564, 2004 WL 869188 (Utah Apr. 23, 2004). In *Campbell*, the Supreme Court of Utah noted that this Court "strongly implied" that single digit ratios mark the outer limits of due process. *Id.* at *9. Accordingly, the Court applied a 9-to-1 ratio between compensatory and

punitive damages and, thus, reduced the punitive damages award from $145 million to $9,018,780.75. *Id.* at ** 10, 12.

The reasoning and holding of the Utah Supreme Court demonstrates that it will likely invalidate any punitive award exceeding a 9-to-1 ratio. Conversely, the Georgia Court of Appeals has signaled that a 22.7-to-1 ratio is permissible in the State of Georgia and that a comparison of the punitive damages award with the actual compensatory damages award is unnecessary. The inconsistent application of *Gore* and *State Farm* by the appellate courts of Georgia and Utah evidences a split among state courts necessitating certiorari in this case.

In sum, the ratio in this case does not come close to the single-digit ratios that have traditionally satisfied due process. Instead, the plaintiff was awarded punitive damages that were over twenty-two times the compensatory damages awarded under circumstances that are no more egregious than any other case involving punitive damages. Thus, the court below did not ensure that the measure of punishment was both reasonable and proportionate to the amount of harm to the plaintiff and to the amount of compensatory damages as is required by *State Farm*. 538 U.S. at 425. Accordingly, Craig's Petition and plenary review should be granted.

B. The Georgia Court Of Appeals' Comparison Of The Punitive Damages Award To Hypothetical Compensatory Damages, Rather Than The Plaintiff's Actual Compensatory Damages, Conflicts With *State Farm*

As is fully set forth in Craig's Petition for a Writ of Certiorari, the court below never compared the actual compensatory damages to the punitive damages award as is required by the second *Gore* guidepost, nor did it

address this Court's recognition that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

Instead, the court below justified the punitive damages award by hypothesizing that the plaintiff could have died as a result of the accident, when in actuality Holsey sustained minor neck and back injuries that had nearly resolved prior to trial. The court then compared hypothetical wrongful death damages awards to the actual punitive damages awarded to rationalize that there was no disparity between the two awards. *Craig v. Holsey*, 590 S.E.2d 742, 748 (Ga. Ct. App. 2003); App. at 10a.

In her Brief in Opposition, Holsey concedes that the second *Gore* guidepost requires review of the actual harm caused by the defendant. (Respondent's Brief in Opposition at p. 14). Yet Holsey ignores that the court below conducted no such review and erroneously argues that certiorari is not necessary because Craig's conduct "could have killed or maimed anyone unlucky enough to find themselves in his path." (Respondent's Brief in Opposition at p. 14).

The comparison of hypothetical damages to the punitive damages award is in direct conflict with *Gore* and its progeny because the court below never applied the second *Gore* guidepost which requires a comparison of the actual harm to the plaintiff and the punitive damages award. *Gore*, 517 U.S. at 582. Just as due process does not permit courts to adjudicate the merits of hypothetical claims under the *Gore* reprehensibility guidepost, the comparison of hypothetical compensatory damages to punitive damages under the second *Gore* guidepost also violates due process. *State Farm*, 538 U.S. at 423.

The notion that hypothetical injuries and damages can be used to satisfy the second *Gore* guidepost, without any consideration of the actual harm to the plaintiff, is fundamentally flawed and erroneous. Accordingly, Craig's Petition for a Writ of certiorari should be granted to correct the Court of Appeals' misinterpretation of *Gore* and *State Farm*.

C. The Georgia Court Of Appeals' Justification Of The Punitive Damages Award By Reference To Dissimilar Conduct Conflicts With *State Farm*

Despite Holsey's statements to the contrary, Craig does not contest that his actions were blameworthy. But the degree of reprehensibility in this case was not commensurate with the punitive damages awarded and it is clear that the court below impermissibly relied upon Craig's dissimilar acts to bolster its reprehensibility analysis.

In affirming the punitive damages award, the court below relied upon evidence that Craig had smoked marijuana prior to and after the day of the accident and further considered the details surrounding Craig's arrest in 1996 and subsequent conviction for possession of a controlled substance in Arkansas.

In her Brief in Opposition, Holsey also relies heavily on dissimilar acts to support her contention that the *Gore* reprehensibility guidepost has been satisfied and that certiorari is not required. Holsey offers support for her argument that Craig's conduct was sufficiently reprehensible by stating that Craig was already on probation for a crack cocaine charge; Craig was an habitual substance user; Craig had previously driven under the influence of both drugs and alcohol prior to this accident; and Craig continued to use drugs after being criminally sanctioned for his conduct in this case. (Respondent's Brief

in Opposition at pp. 3, 9, 11). Yet, none of these accusations are related to the accident in question.

State Farm makes clear that the reliance of the Georgia Court of Appeals and Holsey on Craig's dissimilar acts on other occasions cannot support the punitive damage award. As is fully discussed in Craig's Petition, it is well-established that "[a] defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422. Accordingly, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *Id.* at 423.

It was the act of driving while under the influence on the date of the accident, not Craig's conviction for possession of a controlled substance, which injured the plaintiff. In his dissent, Presiding Judge Andrews of the Georgia Court of Appeals recognized that "this was an isolated incident" and that "Craig had no previous arrests for DUI." *Craig*, 590 S.E.2d at 749; App. at 13a (Andrews, P.J., concurring in part and dissenting in part). Just as in *State Farm*, there is scant evidence here of repeated misconduct of the sort that injured the plaintiff. *State Farm*, 538 U.S. at 423.

Furthermore, Holsey erroneously argues that because there is no cap on punitive damages in the State of Georgia when the defendant acted under the influence of alcohol or drugs, there is support for the punitive damages award. While there is no cap on punitive damages in such cases, this does not alter the fact that grossly excessive punitive damages awards are impermissible because they violate the Due Process Clause of the Fourteenth Amendment. Therefore, the issue of whether or not Georgia legislatively caps punitive dam-

ages is irrelevant because the punitive award here is unconstitutional.

CONCLUSION

Certiorari is warranted in this case because "of the three guideposts set out by *Gore*, the last two are not met, and only two of the five factors to be considered are present in the first one. Accordingly, the punitive damages awarded in this case were excessive and the judgment should be reversed." *Craig*, 590 S.E.2d at 749; App. at 14a (Andrews, P.J., concurring in part and dissenting in part). In particular, the Court of Appeals' failure to compare the actual harm to the plaintiff with the punitive damages award, as is required by *Gore*, makes it imperative that this Court grant certiorari. For these reasons, the decision of the Georgia Court of Appeals directly conflicts with this Court's decisions in *Gore* and *State Farm* and the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JAMES T. BUDD
Counsel of Record
MABRY & MCCLELLAND LLP
2200 Century Parkway, N.E.
10th Floor
Atlanta, Georgia 30345
(404) 325-4800

Counsel for Petitioner